Written submission from the Free Representation Unit (SHW0072)

Executive summary

The Free Representation Unit believes there are substantial barriers to accessing Employment Tribunals, which limit their effectiveness as a form of redress for sexual harassment in the workplace. The key barriers facing people with potential sex harassment claims in the Employment Tribunal are:

- Lack of early legal advice or affordable professional representation; and
- Short time limits for bringing Employment Tribunal claims; and
- Delays in the listing of Employment Tribunal hearings to decide cases.

Introduction

1. The Free Representation Unit (FRU) is a charity that provides free representation to people who are bringing a claim in the Employment or Social Security Tribunal. Most of this representation is done by volunteers, primarily law students and lawyers at the beginning of their career. Some clients reach us directly, but most are referred to us by other advice agencies, such as Citizens Advice and Law Centres. We operate in London, the South East and Nottingham.

2. We represent in approximately 200 employment cases and 400 social security cases each year with the assistance of approximately 400 volunteers. Our employment work covers a wide range of claims, including sexual harassment. This means that FRU has relevant experience of supporting claimants bringing sexual harassment claims in the employment tribunal as well as more general insight into the experience of claimants attempting to access justice through the employment tribunals.

3. FRU is submitting evidence to the inquiry on the basis that the organisation has particular experience of supporting claimants seeking legal redress following sexual harassment. The following issues in the inquiry are relevant to our work:

   a. The efficacy and accessibility of tribunals and other legal means of redress
   b. Potential improvements to the processes involved in bringing claims, managing a case, attending a hearing, engaging in settlement negotiations and enforcing tribunal awards.

FRU’s evidence to the inquiry

4. The primary legal remedy for an employee who has experienced sexual harassment in the workplace is to bring Employment Tribunal proceedings under the Equality Act 2010. The Tribunal can make compensatory awards for injury to feelings, loss of earnings and other losses following the harassment. The Tribunal also has the power to make a recommendation. The factual patterns surrounding incidents of sex harassment frequently give rise to additional claims that the Employment Tribunal has jurisdiction to hear. These include wrongful or unfair dismissal (e.g. if an employee resigns in response to sexual harassment amounting to a breach of their contract of employment), victimisation (e.g.
where an employee suffers detriment as a result of raising a grievance about their sexual harassment) and discrimination on the grounds of other protected characteristics.

5. As bringing an Employment Tribunal claim is the primary means through which someone who has experienced sexual harassment in the workplace can obtain a financial remedy, the barriers which exist for any person with a potential Employment Tribunal claim also apply to those who have experienced sex harassment. The FRU assists litigants in person in the Employment Tribunal by providing them with free representation by trained volunteers. An important barrier for employees to bringing Employment Tribunal claims (including sex harassment) is the real or perceived ‘inequality of arms’ between themselves and their (former or current) employer: employers are far more likely to be in a position to afford professional representation such as a solicitor, a barrister or HR professional than employees. If an employee does obtain legal assistance or representation, this will often be at significant financial expense or through very limited pro bono provision.

Accessibility of Employment Tribunal remedies for employees who have experienced sexual harassment: barriers to bringing an Employment Tribunal claim

6. In broad terms, bringing any tribunal claim will involve drafting the formal legal complaint (in the form of an ET1 claim form) which sets out the factual and legal basis of the complaint. Once the employer’s response (ET3 response form) is received it needs to be considered by the claimant. The value of the claim must be quantified in a schedule of loss. The disclosure process whereby relevant documents are exchanged must be completed and witness statements, which stand as the evidence-in-chief before the Tribunal must be drafted.

7. In most harassment cases, the Tribunal will schedule at least one preliminary hearing to deal with case management before the substantive hearing. It is also common for there to be a separate remedies hearing after the liability hearing. Even a comparatively straightforward harassment claim (e.g. one involving only isolated incidents and not involving any further claims, such as dismissal) is likely to involve a Tribunal hearing of between three to five days.

8. This means that someone who has experienced sexual harassment and who chooses to pursue a claim is likely to spend at least six months dealing with the Tribunal process. The process itself is difficult and distressing. FRU has seen many clients suffer from the effects of this stress. It is not all uncommon for claimants to suffer from depression, anxiety and similar mental health conditions as a result of this process.

9. There is minimal legal and other assistance available to claimants and potential claimants in these claims. Prior to The Legal Aid, Sentencing and Punishment of Offenders Act 2012 there was some funding through legal aid for advice and assistance prior to a tribunal hearing. This has now been removed except in discrimination cases. In FRU’s experience, this is difficult for prospective claimants to access within the short time limits (see paragraphs 19-20) for bringing a claim, and is rarely a factor in the decision to bring a claim.
10. Solicitors and barristers can represent people in tribunal litigation in sex harassment cases. But, in the experience of FRU, unless a claimant is a member of a union or has legal expenses insurance, this advice and representation is financially out of reach. Unlike in the civil courts, in the Employment Tribunal, legal costs are not awarded to the winning party as a matter of course (instead being reserved for cases where a claim or defence is misconceived or behaviour during litigation is unreasonable). At the same time, tribunal awards are generally modest relative to the cost of legal representation, which is driven by the complex nature of these claims, rather than their financial value. This means that the vast majority of cases cannot be funded on a ‘No Win, No Fee’ basis and it is impractical for the claimant to pay privately, even if they have access to funds.

11. Some advice and assistance is available from the voluntary sector, but this varies in quality and is highly geographically dependent. The relatively long length of hearings involving sex harassment and factual complexity of claims means that it is practically very difficult to find expert pro bono assistance through organisations such as the FRU or the Bar Pro Bono Unit. Most voluntary schemes providing pro bono employment advice are only able to give limited advice on an ad hoc basis.

12. FRU submits that the lack of access for claimants to early legal advice prior to bringing claims significantly reduces the efficacy of Employment Tribunal remedies as a means through which to tackle the problem of sexual harassment in the workplace. FRU receives referrals from members of the public and from referral agencies (such as Citizens Advice Bureaux, Law Centres and community groups). Typically, claimants do not receive any assistance at the stage of drafting their claims and submitting a claim form online, aside from non-specific guidance published online. This means that:

   a. Claimants frequently fail to identify precisely which legal claims they can make against their employer (e.g. a claimant may confuse sex harassment and direct sex discrimination and mischaracterise their experience). The Employment Tribunal generally lists preliminary case management hearings (typically between 1-3 hours long) in order to identify the issues in a case in situations where a claim is poorly particularised. The need for such preliminary hearings delays the date for a full hearing to decide the case.

   b. Claimants frequently cannot identify the level of factual detail required to make their claim, or which facts are relevant to their heads of claim.

   c. Claimants do not know the remedies the Employment Tribunal is capable of awarding (e.g. erroneously believing an Employment Tribunal can order a particular employee or manager to be sacked if their sex harassment claim succeeds).

   d. Where an award of financial compensation may be available to a claimant, they typically have difficulty quantifying or calculating the value of their claim (generally overestimating the compensation the Tribunal can award if their claims are successful).
e. In some cases, claimants may not be able to identify against which entity they have a claim (e.g. domestic workers, agency workers, workers in businesses where there has been a transfer of undertakings).

13. FRU submits that the lack of provision of accessible and affordable early advice to potential claimants significantly inhibits the efficacy of legal remedies as a mechanism for addressing the issue of sexual harassment in the workplace. This lack of provision has a disproportionate impact on the most vulnerable groups of potential litigants such as claimants with disabilities, migrant claimants, claimants who speak English as an additional language and claimants with caring responsibilities (who are overwhelmingly women).

14. Furthermore, unlike many Employment Tribunal claims, sexual harassment frequently arises while the claimant remains employed. In our experience, potential claimants who have been dismissed are more likely to pursue a claim. Potential claimants who remain employed face difficult choices as they try to balance their desire to resolve their complaint satisfactorily with the potential negative consequences. Many potential claimants fear that they may be dismissed or suffer other recriminations from their employer. Even the most optimistic employee is likely to recognise that bringing a claim is likely to damage their relationship with their employer and colleagues. They also worry about wider reputational consequences, stigma and other career implications. These prospects deter many prospective claimants with sex harassment claims from bringing proceedings.

**Representation at Employment Tribunal hearings**

15. When an Employment Tribunal is determining facts in dispute between the employer and employee, witnesses are called from both sides and cross examined. The prospect of cross-examining witnesses unrepresented discourages claimants from bringing claims, as does being cross-examined by the individuals involved where they are not represented.

16. After being represented by FRU volunteers, clients often express the view that they would not have pursued or continued with their claim had they not had the benefit of free representation. While employment litigation is generally stressful for any kind of employment tribunal claim, the sensitive and emotional nature of cross examination in sex harassment cases presents a particular barrier to prospective litigants. For example, a factual determination to be made in by the Employment Tribunal in any sex harassment case is whether the alleged conduct was unwanted by the claimant. A claimant representing themselves in such a circumstance would be required to challenge the evidence brought by cross-examining employers or colleagues. A representative who was not personally involved in the disputed incident is better placed to challenge evidence effectively.

**Settlement of sex harassment claims**

17. A requirement of bringing a claim in the Employment Tribunal is to undergo ACAS Early Conciliation in an attempt to settle the claim without the need to for Employment Tribunal proceedings. Settlement negotiations are generally ongoing until the Tribunal hearing. FRU submits that the likelihood of a settlement being agreed between the parties is higher when claimants are represented for the following reasons:
a. In our experience, trained representatives are better placed than the claimant themselves to accurately quantify the claim (see above at paragraph 6(d)) and advise the client on the relative merits of their case. This makes settlement more likely, as claimants can better understand the risks and potential benefits of proceeding to an Employment Tribunal hearing.

b. Representatives are a factor removed from the often emotionally charged factual disputes in a case. This means that negotiating an agreement with the employer or the employer’s professional representative can be done more effectively.

c. Represented employers generally offer settlement on standard terms, which almost invariably include confidentiality clauses (e.g. that a claimant keeps the existence of the settlement agreement and the litigation leading to it confidential, save for their immediate family). Claimants representing themselves often do not realise that they can counter-offer alternative settlement terms in the course of settlement negotiations.

d. Representatives are able to offer emotional as well as legal support through negotiations, which can be unusually stressful in the context of sex harassment cases.

e. Claimants better understand the role of ACAS as a neutral third party conciliator.

18. The inappropriate use of agreements requiring non-disclosure would best be curbed by the availability of free or affordable representation. This reduces the risk of claimants feeling pressured or coerced by the fact that their employer is professionally represented into agreeing to a settlement which is unacceptable to them, or out of fear of the Employment Tribunal hearing itself.

Time limitation on Employment Tribunal jurisdiction

19. The period of time in which a potential claimants must generally file their claims with the Employment Tribunal is short – three months less one day from the act giving rise to the claim, with an extension of time spent in ACAS early conciliation and a potential one month extension if the early conciliation period falls within the last month of the initial three month period.

20. While an Employment Tribunal may hear a sex harassment claim out of time if it is just and equitable to do so, FRU submits that the short limitation period presents a further barrier to the efficacy of Employment Tribunal remedies as a response to sexual harassment in the workplace. The need to show that it would be just and equitable to hear an out-of-time claim places a greater evidentiary burden on claimants, which could be avoided if the limitation period was longer.

Delays in Tribunal listing of sex harassment cases
21. FRU welcomes the removal of Employment Tribunal fees following the Supreme Court decision of *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 and the subsequent significant increase in claims filed with the Employment Tribunal. However, in our experience the rise in claims has placed the administrative and judicial resources of the Employment Tribunal under great strain. Hearings are typically listed for dates nine to twelve months after a claim form is accepted by the Tribunal, with further delays if any postponements are requested by either the employee or employer. Only 52% of open track cases (which will include almost all harassment claims) are resolved within 26 weeks.\(^1\) It is not uncommon for claims to take several years to resolve.

22. It is worth noting that the ongoing listing problems particularly affect claimants with sex harassment cases. Claims which feature any element of sex harassment are typically listed for a hearing length of three days or longer, due to:

   a. The need to cross-examine multiple witnesses on both sides
   b. The fact that claimants are typically unrepresented and so require more time to explain their case to the Employment Tribunal judge
   c. The fact that sex harassment is rarely brought as the only claim on a given set of facts (it is often brought concurrently with sex discrimination).

23. The greater number of consecutive days a case is listed for, the more difficult it is for the Employment Tribunal to find an available hearing. Due to the longer than average length of cases featuring sex harassment, the delays in the listing of tribunal hearings significantly hamper the effectiveness of Employment Tribunal claims as a means of redressing sex harassment issues in workplaces. Delays lead to relevant evidence (e.g. email correspondence) and witnesses being more difficult to obtain for the hearing.

**Recommendations**

24. Extending the three month time limit for the Employment Tribunal to have jurisdiction to hear sexual harassment claims to two years.

25. Legal aid provision for both early advice and representation for claimants who have claims which include sex harassment or sex discrimination elements.

26. Greater administrative and judicial resources made available to the Employment Tribunal.

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\(^1\) ET National User Group Minutes, 19th June 2017